

other interest, will be considered an affiliate for purposes of this part, unless the Board determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the Board may determine that financial relationships of the applicant, other than those described in this paragraph, constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

**§ 1023.305 Standards for awards.**

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The position of the agency includes, in addition to the position taken by the agency in the covered proceeding, the action or failure to act by the agency upon which the covered proceeding is based. The burden of proof that an award should not be made to an eligible prevailing applicant because the agency's position was substantially justified is on the agency counsel.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

**§ 1023.306 Allowable fees and expenses.**

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys or expert witnesses even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney under these rules may exceed \$75 per hour. No award to compensate an expert witness may exceed the highest rate at which the respondent agency or agencies pay expert witnesses. However, an award may also include the reasonable expenses of the attorney or

witness as a separate item, if the attorney or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney or expert witness, the Board shall consider the following:

(1) If the attorney or witness is in private practice, his or her customary fees for similar services, or, if an employee of the applicant, the fully allocated costs of the services;

(2) The prevailing rate for similar services in the community in which the attorney or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the services does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of applicant's case.

**§ 1023.307 [Reserved]**

**§ 1023.308 Awards against other agencies.**

If an applicant is entitled to an award because it prevails over another agency of the United States Government that participates in a proceeding before the Board and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

INFORMATION REQUIRED FROM  
APPLICANTS

**§ 1023.310 Contents of application—overview.**

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the agency or agencies that